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# Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Preemption of State and Local Zoning and  
Land Use Restrictions on the Siting,  
Placement and Construction of Broadcast  
Station Transmission Facilities

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MM Docket No. 97-182

To: The Commission

**JOINT COMMENTS OF THE  
NAMED STATE BROADCASTER ASSOCIATIONS**

The California Broadcasters Association, the Connecticut Broadcasters Association, the Florida Association of Broadcasters, the Illinois Broadcasters Association, the Kansas Association of Broadcasters, the Louisiana Association of Broadcasters, the Maine Association of Broadcasters, the Maryland/D.C./Delaware Broadcasters Association, the Massachusetts Broadcasters Association, the Minnesota Broadcasters Association, the Missouri Broadcasters Association, the Nebraska Broadcasters Association, the New Hampshire Association of Broadcasters, the New York State Broadcasters Association, the Ohio Association of Broadcasters, the Oklahoma Association of Broadcasters, the Oregon Association of Broadcasters, the Pennsylvania Association of Broadcasters, the Tennessee Association of Broadcasters, the Texas Association of Broadcasters, the Utah Broadcasters Association, the Vermont Association of Broadcasters, the Washington State Association of Broadcasters, and the

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Wisconsin Broadcasters Association (collectively, the "Associations"), by their attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, hereby jointly submit their comments concerning the Commission's Notice of Proposed Rule Making ("NPRM").<sup>1/</sup>

## I. INTRODUCTION

1. The Associations appreciate the opportunity to provide their views on the issue of whether the Commission should adopt rules for the preemption of state and local zoning and land use restrictions on the siting, placement and construction of broadcast station transmission facilities. Each of the Associations is chartered to help create and maintain a regulatory and economic environment that is optimally conducive to the growth of the free, over-the-air, local, television and radio broadcast industries in their respective states. The Associations have a direct interest in this matter since they represent entities regulated by the Commission, many of whom are faced with the need to move their transmitter sites or to modify their existing ones as a result of the Commission's digital television ("DTV") proceeding, and for other reasons. Therefore, the Associations have the requisite interest to participate in this important proceeding.

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<sup>1/</sup> Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities, Notice of Proposed Rule Making, ("NPRM"), MM Docket No. 97-182, FCC 97-296 (August 19, 1997).

2. By its *Fifth Report and Order*<sup>2/</sup> and *Sixth Report and Order*,<sup>3/</sup> the Commission has sought "to ensure the preservation of a universally available, free local broadcast service and the swift recovery of broadcast spectrum."<sup>4/</sup> These DTV actions will have an important impact on broadcasters and consumers throughout the United States. As a result, broadcasters are now presented the opportunity to offer an enhanced television service to consumers, as well as with the challenge of developing the necessary resources to offer DTV. The change over to DTV will require a significant financial investment to incorporate the new technology and modify existing facilities.

3. The greatest risk to this DTV undertaking is delay and arbitrary processes at the state and local zoning and land use levels. Experience has shown that state and local processes often result in undue delay and cost in prosecuting facilities requests, the arbitrary denial of requests and the unreasonable conditioning of grants. Such actions leave broadcasters caught in the middle between federal requirements to quickly implement DTV broadcasting on the one hand, and state and local restrictions on their ability to move ahead with the necessary facility approvals on the other.

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<sup>2/</sup> Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, FCC 97-116 (April 21, 1997) ("*Fifth Report and Order*"), 62 F.R. 26966 (May 16, 1997).

<sup>3/</sup> Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, MM Docket No. 87-268, FCC 97-115 (April 21, 1997) ("*Sixth Report and Order*"), 62 FR 26684 (May 14, 1997).

<sup>4/</sup> NPRM, *supra* note 1, at 2.

4. The Associations seek a balanced approach that will take into consideration the need of broadcasters to move forward quickly with construction and modification plans, while recognizing the legitimate role of state and local zoning and land use authorities to protect the health and safety of their citizens. A clear rule by the Commission is needed to permit broadcasters to cut through the "red tape" and delays of unreasonable regulation, while permitting legitimate local concerns to be addressed. The Associations are of the opinion that the rule proposed in the Petition for Further Notice of Proposed Rule Making submitted jointly by the National Association of Broadcasters and the Association for Maximum Service Television, MM Docket No. 87-268 ("NAB Petition") is an essential and constructive approach to the resolution of this problem. However, some changes to the proposed Rule are warranted to eliminate certain ambiguities in the present formulation of the rule that state and local authorities could use to defeat the intent of the NAB Petition and of the Commission.

## **II. DISCUSSION**

### **A. The Problem**

5. The Commission's DTV implementation schedule requires television broadcasters to act quickly. Many television stations will not be able to construct digital facilities using their existing transmitter sites. Approximately 66% of all existing television broadcasters will need new or upgraded towers in order to move to digital television broadcasting. Furthermore, many FM radio antennas currently located on towers used jointly for television and radio broadcasting will be displaced as a result of the DTV conversion requirements. Many of these towers are currently at or near capacity and, due to weight load and wind shear restrictions, will not be able to support the additional weight of DTV facilities. The displaced FM radio stations will need to

relocate to other existing towers or construct their own new tower facilities. Thus the conversion to DTV will have an impact on the entire broadcast industry.

6. Broadcasters have learned from experience that the state and local zoning process can be a frustrating experience. The process of obtaining authorizations from state and local land use authorities has often delayed or prevented tower construction in the past, and the problem is becoming more severe due to the many tower construction requests that continue to be submitted by cellular and PCS service providers. Broadcasters often find themselves literally standing in line behind these other telecommunications providers in the process of presenting their tower construction requests to local authorities whose patience is wearing thin in the face of this onslaught. Broadcasters are confronting *de facto* moratoriums on all new tower construction. While the Telecommunications Act of 1996<sup>5/</sup> provided zoning and land use preemption for the cellular and PCS industries, no equivalent statutory protections exist for broadcasters.

7. The following are but a few examples of the problems faced by broadcasters who have attempted to build towers in recent years. These examples come from the three broadcast services: AM, FM, and television. The towers planned in the following illustrations all complied with Commission regulations. Yet local authorities prevented their implementation through an array of regulatory devices.

WBUX(AM), Doylestown, Pennsylvania

The Commission granted the application of WBUX(AM), Doylestown, Pennsylvania to increase the height of its tower to 111.6 meters above ground level on March 4, 1992. Since that time, the station has been attempting to obtain the necessary Permit for Conditional Use from the Bucks County Board of Supervisors in order to

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<sup>5/</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

begin the construction. Despite the fact that the Board gave informal approval of the construction plans before the station sought Commission approval, a well-organized citizen opposition attended the hearing, prompting the Board to request more information. From April of 1992 through October of 1993 a hearing took place every month on the station's request, and at each meeting the station presented more evidence supporting its application. Finally, on February 15, 1994, the Board issued a ruling that effectively denied the station's tower construction request. Following that denial the station initiated the appeals process, and after the Board failed to render a decision within a statutorily required 90 day time period, a Complaint for Mandamus was entered in the Court of Common Pleas for that jurisdiction. A decision from that court has yet to be issued. Now more than five years has passed since the station received authorization from the Commission, and the station has incurred a cost of roughly \$100,000 in legal fees and costs of scientific studies that has almost financially ruined the enterprise. The station has not yet been able to begin construction of its tower, and thus is unable to broadcast at the power authorized by the Commission.<sup>6/</sup>

WZID(FM), Manchester, New Hampshire

WZID(FM) of Manchester, New Hampshire recently approached the Zoning Board of Adjustment in the nearby township of Goffstown, New Hampshire with a request for a zoning exception to permit it to build a backup auxiliary tower across the street from its existing tower. During the hearing on the matter, the Board informed the broadcaster that the town was contemplating a telecommunications study, and demanded that the station contribute \$15,000 to fund the study before the request could be considered. The study, a \$50,000 project which focused primarily on the cellular and PCS industry, was to be funded jointly by three parties who happened to appear before the zoning board, even though one was an FM radio broadcaster and another was a television station which was merely requesting permission to build a cement pad for its generator. WZID's request was tabled twice and has still not been granted. Officially, the Board deemed the application "incomplete," but made it clear that funding the study was the prerequisite to obtaining approval. No formal record is available of the proceedings. Because of the weather conditions in New Hampshire, the Board's delay means that the project will have to wait until next spring even if approval is granted in the near future.<sup>7/</sup>

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<sup>6/</sup> The information is based on the Station's Application for Extension of Broadcast Construction Permit filed August 8, 1997, and on a telephone conversation with the licensee on October 24, 1997.

<sup>7/</sup> The information is based on a telephone conversation with the licensee on October 22,  
(continued...)

WJFW-TV of Rhinelander, Wisconsin

Television station WJFW-TV of Rhinelander, Wisconsin has been searching for a tower site since June of 1996. After finding a proposed site in a rural area that was more than a mile from the nearest residence, county board meetings were held on the topic in Taylor County, Wisconsin. Citizens wrote the Board and showed up at the meetings to voice their opposition to any tower construction because of the following objections: radiation hazards, annoyance of the pulsating lights, air safety, nervous disorders, alcoholism, and killing of cattle due to stray voltage. The proposed tower complied with federal radiation regulations, as the maximum radiation at the base of the tower was calculated to be only .1069% of the allowable limit. Between January and August of 1997, representatives of the station appeared before the Board each month, presenting scientific data based on FCC and international standards to demonstrate that the tower facility posed no risk to the residents of the community. The Board denied the request without providing a written decision or specific reasons for the denial other than to say that there would be no new towers in Taylor County. After being denied the tower request in Taylor county, the station was unable to find any other appropriate site and abandoned its plans to build a tower.<sup>8/</sup>

8. These examples illustrate some of the realities that are faced by broadcasters who approach state and local zoning and land use authorities. First, the process of hearings and appeals can stretch on for a period of many years and be very costly. The proceedings before local authorities can involve repeated postponements in decision making and calls for more hearings. Such delays will make it impossible for broadcasters to meet the Commission's required timeline for DTV implementation. Further, such proceedings place a heavy burden on broadcasters, in terms of the cost of prosecuting their requests, the cost of lost opportunities

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<sup>2/</sup> (...continued)  
1997.

<sup>8/</sup> The information is based on a telephone conversation with the licensee on October 23, 1997.

while the matter is tied up in proceedings, and the cost of locating alternative tower sites. A system is needed that will ensure that up or down decisions will be made by state and local authorities within a reasonably short period of time so that broadcasters can proceed with construction plans, investigate other alternatives or appeal negative actions.

9. Second, often these zoning and land use proceedings focus on the same issues that the FCC and the FAA are fully capable of evaluating and addressing. It is true that state and local governmental authorities have an important role to play in protecting the health and safety of their citizens. For example, tower construction that might endanger area residents due to an insufficient fall zone would be of legitimate concern locally. On the other hand, state and local authorities should not engage in duplicative evaluations in areas that the Commission and the FAA have already undertaken to review, e.g. RF radiation emissions.

10. Finally, many local authorities simply deny tower construction requests without providing applicants with any specific reason for the denial. In order to reduce the risk of arbitrary and capricious decision making and insure a meaningful appeal opportunity, a party whose request has been delayed, denied or granted with conditions should receive a written decision based on substantial evidence in the record, with specific reasons for the delay, denial or conditioning of a grant. In order to ensure a speedy and fair process to applicants, these requirements are essential.

## **B. The Solution**

11. The Associations wholeheartedly support the need for the proposed Rule, and are in general agreement with its approach. However, we are of the opinion that certain modifications are needed. Primarily, there are a few terms in the proposed Rule that could be



misinterpreted. Certain word changes would ensure that the Rule is interpreted consistent with the Commission's intent. Most of the specific suggested changes outlined below merely close potential loopholes to ensure that the Rule is successful in accomplishing the Commission's objectives. The suggestions of the Associations have been incorporated into the proposed Rule which has been redlined to show the changes. See Exhibit A hereto.

12. State and local authorities should be required to make up or down decisions, i.e., "grant or deny" requests, within a fixed time frame. Current Sub-section (a) of the proposed Rule uses the phrase "shall act on a request." The intent of this phrase is to require state and local authorities to act within a reasonable period of time or risk having the FCC "grant" the request. However, the term "act on a request" could be interpreted to include actions by such authorities to designate the matter for an evidentiary hearing, or to defer it or hold the matter in abeyance for further proceedings. Thus, under the current language a local authority could slip through a loophole by "acting" to defer the matter until a later date, thus circumventing the Commission's intent in adopting the proposed Rule. The state and local authorities should be given only two options: grant or deny the request. At least then, the applicant can appeal the denial.

13. The time limits of 21 days, 30 days, and 45 days indicated in current Sub-section (a) should be triggered by the filing of a request to place, construct, or modify facilities. As currently written, the Rule does not clarify the starting point of these time limits. The addition of the words "of filing" after each time limit would clarify this matter and insure that the Rule is properly interpreted.

14. At several provisions in the proposed Rule, the term “deny a request” is used. Since applicants may receive unfavorable decisions that are technically not denials, the use of “deny” a request does not adequately take into account all possible state or local authority decisions that could have the effect of preventing swift DTV implementation. Under the current wording, a state or local authority could, for example, grant a construction permit with a condition that places such an unreasonable burden on a broadcaster that the “grant” is a de facto denial. Or such authority could “act” to defer the request until a later date without denying the request outright. A decision to delay can, in effect, be a decision to deny. Therefore, we recommend the phrase “deny, delay the disposition of, or conditionally grant a request” be used in place of “deny a request” in Sub-sections (b)(1) and (c), the phrase “denied, delayed, or conditionally granted” be used in Sub-section (d), and “denial, delay, or conditional grant of any request” be used in Sub-section(e).

15. At Sub-section (b)(1)(iv), it is proposed that the types of issues outside the purview of the state and local authorities be expanded to further reduce the risk of duplicative and inconsistent decision making.

16. At Sub-section (b)(2), the preemption paragraph should include “orders”, and “actions” as well as laws, rules, and regulations. Delays, denials and conditional grants emanate from actions and orders. Therefore the language should include the decisions of local entities among the items subject to preemption.

17. At Sub-section (b)(2), the term “reasonably necessary to accomplish:” has been substituted for “reasonable in relation to:” to make it clear that the state or local zoning, land-use, building or similar laws, rules, regulations, orders and actions must be “necessary,” not just

appropriate. Furthermore, the phrase “the promulgating authority can demonstrate that” has been deleted. The Commission, not the local government body, is the appropriate authority to determine the proper balance between federal and local interests. Furthermore, the Associations do not want state and local authorities to infer that they should engage in the “weighing” evaluation by conducting a broadcast “needs” survey at the local level. This would protract proceedings and involve the local authorities in reviewing the FCC’s own determinations. To further clarify this matter, the language “does not frustrate” should be inserted between Sub-section (b)(2)(i) and Sub-section (b)(2)(ii) to indicate that the local interests in the former Sub-section may not frustrate the federal interests in the latter.

18. There is an ambiguity as to the event that triggers the five day period after which a written decision is required in Sub-section (c) of the proposed Rule. A written decision should be required within five days of any action to delay, deny, or condition a request. While the context indicates that this is the likely meaning, a more clear indication of the start of the five day period would be helpful. Likewise, a triggering event is needed in Sub-section (e). In that provision we have added that the Commission should act on petitions within thirty (30) days “of filing.”

19. As currently written, there is no remedy specified for a broadcaster who does not timely receive a written decision pursuant to Sub-section (c). A failure to comply with the requirement of a written decision should result in the applicant’s request being deemed granted, the same remedy that is provided in Sub-section (a) for local authorities who do not grant or deny within a specified period of time.

20. In Sub-section (e), the proposed Rule provides that any broadcaster adversely affected by a local authority's "final action or failure to act" should permit the broadcaster to seek a declaratory ruling. The use of the term "final" in this sentence might be construed to require the exhaustion of all local review procedures before the alternate dispute resolution or the declaratory ruling mechanisms become available. Since the local process of appeals can drag on for years, this wording could prohibit broadcasters from timely constructing their new facilities. Substitution of the phrase "denial, delay, or conditional grant of any request" in place of "final action or failure to act" in this sentence should avoid such a result.

21. Finally, other changes have been made to clarify the intent of the Rule. The meanings of these minor changes are evident from the context.

### III. CONCLUSION

Based on the foregoing, the Associations respectfully urge the Commission to adopt the proposed Rule with the modifications set forth herein.

Respectfully submitted,

The California Broadcasters Association  
The Connecticut Broadcasters Association  
The Florida Association of Broadcasters  
The Illinois Broadcasters Association  
The Kansas Association of Broadcasters  
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The New Hampshire Association of  
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The New York State Broadcasters Association  
The Ohio Association of Broadcasters  
The Oregon Association of Broadcasters  
The Oklahoma Association of Broadcasters  
The Pennsylvania Association of  
Broadcasters  
The Tennessee Association of Broadcasters  
The Texas Association of Broadcasters  
The Utah Broadcasters Association  
The Vermont Association of Broadcasters  
The Washington State Association of  
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**Exhibit A**  
**Proposed Rule with Suggested Changes**

Sec. \_\_\_\_ Broadcast Antenna Facility Siting.

In order to facilitate the rapid deployment of Digital Television ("DTV") services, as authorized by the Commission in MM Docket No. 87-268, and in recognition of the need to facilitate the siting and construction of broadcast transmission facilities generally, the following procedures and rules shall apply to the siting of new broadcast transmission facilities by television and radio stations whose operations have been authorized by the Commission.

- (a) Siting Procedures. A State or local government or instrumentality thereof shall ~~act on~~ ***grant or deny*** any request for authorization to place, construct, or modify broadcast transmission facilities within a reasonable period of time after a written request is filed with such government or instrumentality for any required permit or other authorization. For purposes of this subsection, a "reasonable period of time" shall mean:
- (1) within twenty-one (21) days ***of filing***, with respect to requests to (i) modify existing broadcast transmission facilities where no change in location or overall height is proposed, and (ii) strengthen or replace an existing broadcast transmission facility;
  - (2) within thirty (30) days ***of filing***, with respect to requests to (i) relocate existing broadcast transmission facilities from a currently approved location to another location within 300 feet; (ii) consolidate two or more broadcast transmission facilities on a common tower or other structure, whether the tower or other structure is pre-existing or new; or (iii) increase the height of an existing tower;
  - (3) in all other cases, within forty-five (45) days ***of filing***.

The failure of a state or local government or instrumentality thereof to ~~act on~~ ***grant or deny a*** ~~any~~ request within a reasonable period of time ~~will~~ ***shall*** result in ~~the~~ ***such*** request being deemed granted ***for all purposes***.

- (b) Preemption.
- (1) No state or local government or instrumentality thereof may deny, ***delay the disposition of, or conditionally grant*** a request to place, construct or modify a broadcast antenna facility on the basis of:
    - (i) the environmental or health effects of radio frequency emissions to the extent that such facility has been determined by the Commission to comply with the Commission's regulations and/or policies concerning such emissions;

- (ii) interference effects on existing or potential telecommunications providers, end users, broadcasters or third parties, to the extent that the broadcast antenna facility has been determined by the Commission to comply with applicable Commission regulations and/or policies concerning interference;
  - (iii) lighting, painting, and marking requirements, to the extent that the facility has been determined by the Federal Aviation Administration ("FAA") or the Commission to comply with applicable FAA and Commission regulations and/or policies regarding tower lighting, painting and marking; *or*
  - (iv) ***any environmental matter involving officially designated wilderness areas, wildlife preserves, threatened or endangered species wildlife habitats, historical sites listed or eligible for listing in the National Register of Historic Places, Indian religious sites, 100-year floodplains as determined by the Federal Emergency Management Agency ("FEMA") flood insurance rate maps, significant changes in surface features (such as wetland fills, deforestation or water diversion).***
- (2) Any state or local ***zoning***, land-use, building, or similar law, rule, ~~or~~ regulation, ***decision, order or action*** that impairs the ability of federally authorized radio or television operators to place, construct or modify broadcast transmission facilities, is preempted unless ~~the promulgating authority can demonstrate that such law, rule, regulation, decision, order or action is reasonable in relation to~~ ***reasonably necessary to accomplish:***
- (i) a clearly defined and expressly stated health or safety objective other than one related to those set forth in Section (1)(i)-~~(iii)~~ (iv) above; and

***does not frustrate***

- (ii) the federal interests in (i) allowing federally authorized broadcast operators to construct broadcast transmission facilities in order to render their service to the public; and (ii) fair and effective competition among competing electronic media.
- (c) Written decision. Any decision by a State or local government or instrumentality thereof ***the effect of which is to deny, delay the disposition of, or conditionally grant*** a request to place, construct, or modify a broadcast antenna facility shall be in writing and supported by

substantial evidence contained in a written record. Such written decisions shall be delivered to ~~all~~ **the** applicants within five (5) days **of the action taken or the request shall be deemed granted for all purposes.**

- (d) Alternative Dispute Resolution. In the event that an applicant's ~~request is denied approval~~ to place, construct, or modify a broadcast antenna facility **is denied, delayed, or conditionally granted**, the applicant may elect to have its request submitted to an alternate dispute resolution process which shall be administered by the Commission. An applicant whose request has been ~~denied~~ **denied, delayed, or conditionally granted** may elect arbitration by filing a written notice of election, including a copy of the written decision of the state or local government or instrumentality thereof, with the Commission within ten (10) days of **the applicant's** receipt of the decision of the state or local government or instrumentality thereof **if such decision is available**. The Commission shall select an arbitrator to hear and resolve the dispute within five (5) days of receipt of the notice. The Commission shall conduct and complete the arbitration within fifteen (15) days of receipt of the applicants' written request for arbitration. If it is determined that the decision of the state or local government or instrumentality thereof is unsupported by the evidence in the record and would, if allowed to stand, frustrate the federal interests set forth above in paragraph (b)(2)(ii), the Commission shall issue an order vacating the decision of the state or local government or instrumentality thereof and granting the applicant's request to place, construct, or modify its broadcast antenna facility.
- (e) Declaratory Relief. Any radio or television operator adversely affected by any ~~final action or failure to act~~ **denial, delay, or conditional grant of any request** by a State or local government or any instrumentality thereof that is inconsistent with this rule may, within 30 days after such action or failure to act, petition the Commission for a declaratory ruling requesting relief. The Commission shall act on such ~~petitions~~ **petition** within thirty (30) days **of filing**.
- (f) Definitions. For purpose of this section:
  - (i) "Broadcast transmission facilities" shall mean towers, broadcast antennas, associated buildings, and all equipment cables and hardware used for the purpose of or in connection with federally authorized radio or television



broadcast transmission.

- (ii) "Broadcast operator" shall mean a person, firm, corporation or other form of business organization which has been issued a construction permit, license, experimental authorization, special temporary authorization, or other authority from the Federal Communications Commission.